No. 1036

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

ATKINSON DREDGING COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Atkinson Dredging Company petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit entered in this case on February 24, 1964.

OPINIONS BELOW

The decision of the Court of Appeals (App. A, *infra*, p. 1a) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Re-

lations Board in the unfair labor practice case (TR. Vol. 1, pp. 1-15)[1] are reported at 141 NLRB No. 117. The opinion of the National Labor Relations Board in the representation case (TR. Vol. 1, p. 91) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1964 (App. A, *infra*, p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act as amended, 29 U.S.C. 160(e).

QUESTIONS PRESENTED

1. Whether laid-off or former employees are entitled to vote in an union representation election within the "reasonable expectation for reemployment" doctrine notwithstanding the fact that their employment was sporadic with the employer as well as with other employers in the industry, and dependent upon the employer obtaining specific contracts.

2. Whether the Court of Appeals erred in ruling that there was substantial evidence on the whole record to support the Board's decision.

STATEMENT

The petitioner, Atkinson Dredging Company, is engaged in the marine construction and land reclamation business with its main yard and office at Great Bridge, Virginia. It also has a facility at Wilmington, North Carolina. The petitioner operates three dredges, the Enterprise, the Hampton Roads and the North Wood.

[1] "TR." refers to the transcript of record of the Court of Appeals printed in two volumes.

The respondent hires unskilled workmen to perform work on specific dredging jobs (TR. Vol. 1, 145-146, 318-320) and the number of employees of the petitioner has varied according to its success in obtaining new contracts (TR. Vol. 1, 142). There are no seniority rules determining employment of prior employees, and the petitioner, more often than not, will hire local employees at the site of the dredging job to work in these unskilled positions. (TR. Vol. 1, 145-146, 285, 286-287, 320, 366).

The unskilled workmen drifted from one company to another depending upon whether a dredging company had received a contract for a specific job and work was available. Many worked more frequently for other firms than for Atkinson. (TR. Vol. 1, 154-159, 161, 179, 181).

On April 6, 1961, the National Labor Relations Board directed a representation election among petitioner's employees employed during the payroll period ending April 1, 1961. The election was held on May 4, 1961, and thirty-five men voted.[2] Twenty-two of the ballots were challenged, and of the remaining thirteen unchallenged ballots five voted for the union[3] and eight voted against it. Inasmuch as the challenged ballots could affect the result of the election, the Regional Director of the NLRB, after an investigation, directed a hearing on the challenges.

The hearing was held on September 19 and 26, 1961, and on October 27, 1961, the hearing officer recom-

[2] The number of unskilled employees of respondent ranged from zero to about one hundred. (Tr. Vol. 1, 142)

[3] International Union of Operating Engineers, Local Union 25, Marine Division, AFL-CIO.

mended to the Board that eight challenges be sustained and that fourteen be overruled.

Petitioner filed exceptions to the recommendations that the challenges to ten ballots[4] be overruled.

Of these ten, petitioner contended that one had been injured prior to the eligibility date, and had not returned to work, but instead sought employment elsewhere.[5] Petitioner contended that two others were not employed either on April 1, the eligibility date, or on May 4, the date of the election.[6] At the time of the election one of these voters had obtained full time employment elsewhere at a higher rate of pay.[7] Petitioner contended in its exceptions that the other seven had terminated their employment prior to the election and had no reasonable expectancy of reemployment at a reasonable time in the future.[8] Of these seven, one had regular full time employment elsewhere at the time of the election,[9] and five obtained regular employment elsewhere within two weeks to a month after their jobs

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[4] Berkley Gillikin, Leon T. Rose, Walton Gillikin, R. D. Sellers, Hugh Brown, Willie Brown, Donnie Gillikin, Hampton Leonard, Eldred Robinson, and C. R. Dixon, Jr.

[5] Walton Gillikin.

[6] Berkley Gillikin and Leon T. Rose.

[7] Berkley Gillikin.

[8] R. D. Sellers, Hugh Brown, Willie Brown, Donnie Gillikin, Hampton Leonard, Eldred Robinson, and C. R. Dixon, Jr. Petitioner did not file exceptions to the Hearing Officer's recommendations that the ballots of Ellis Fulford, Jabie Fulford, Luther Grissett and Walter Corbett be counted. (Tr. Vol. 1, 90)

[9] R. D. Sellers. As stated above, Berkley Gillikin also occupies this category of regular full time employment elsewhere at the time of the election.

were completed, with the petitioner.[10] Of the eight challenged ballots which were sustained, the petitioner was in agreement with the Hearing Officer's recommendation on seven of them,[11] and of this category filed exception only on the recommendation pertaining to Floyd Hewitt.[12]

The Board denied the petitioner's request for oral argument on its exceptions, and in its Supplemental Decision and Direction issued on April 11, 1962, directed that fifteen of the challenged ballots should be opened and counted.[13] At the opening of the challenged ballots on April 19, 1962, petitioner requested that the Regional Director segregate the counting of the challenged ballots in order to preserve its position that the challenges did not fall within the same category.[14] This was denied and the ballots were mingled. The challenged ballots changed the result of the election in favor of the union, fifteen to thirteen. The petitioner filed objections to the conduct of the election and conduct affecting the result of the election and the

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[10] Walton Gillikin, Hugh Brown, Willie Brown, Donnie Gillikin, Hampton Leonard.

[11] Gaither Bevinson (Brinson), Terry Gillikin, Bert Robinson, Graham Smith, Junior L. Smith, Bobby Gillikin and Jerry Harrelson.

[12] Hewitt was reemployed about a week before the election. (Tr. Vol. 1, 75, 92.)

[13] The Board agreed with respondent that Hewitt's ballot should be counted. Hewitt did not testify at the hearing.

[14] (a) Those employees whose employment had been terminated prior to the date of eligibility, (b) employees who were employed on eligibility date but whose employment terminated prior to the date of the election, (c) employees who were employed both on the eligibility date and date of election but some of whose names because of clerical error did not appear on the eligibility list.

counting of challenged ballots. (TR. Vol. 1, 103-104). On May 8, 1962, the Regional Director recommended that the objections be overruled, and again the petitioner appealed to the Board by filing exceptions. Again, its request for oral argument was denied (TR. Vol. 1, 113), and on July 16, 1962, the Board in a Second Decision and Certification of Representation certified the union.

When the union attempted to bargain with the petitioner, the petitioner refused to do so in accordance with the established procedure to obtain judicial review of the representation case.

The respondent was cited for an unfair labor practice, and at the hearing held on December 13, 1962, attempted to introduce evidence to support its position that the certification of the union was invalid. *This offer of proof was denied* and the trial examiner held that the union had been properly certified. The case came before the Court of Appeals for the Fourth Circuit upon petition of the Board for enforcement of its order issued against this petitioner on April 15, 1963.

The Court below held that there was substantial evidence on the whole record to support the Board's determination. In doing so it stated:

> "In the Board's decision and order of April 15, 1963, in the complaint case, the prior certification was considered and reaffirmed. Thus in ruling that Respondent [Petitioner] had committed an unfair labor practice the Board necessarily found that no ineligible former employees had voted in the representation election of May 4, 1961." (Appendix A, *infra*, p. 4a) (Brackets added).

In discussing the applicable case law, the Court below stated:

> "The Fourth Circuit has upheld Board decisions which permitted unemployed seasonal employees to vote where they "had at time of the election a reasonable expectation of reemployment within a reasonable time in the future". *N.L.R.B.* v. *Jesse Jones Sausage Co.*, 309 F. 2d 664, 665 (4 Cir. 1962) Respondent [Petitioner herein] would have us give too narrow an interpretation to the *Jesse Jones Sausage* case and limit its application to seasonal industries where employees have a reasonable expectation of reemployment at a specific time in the future. There is nothing in the language or logic of the case to so restrict its applications. Other circuits have extended its rationale to sporadic as well as seasonal employment." Citing *Whiting Corp.* v. *NLRB*, 200 F. 2d 43 (7th Cir. 1952); *Marlin-Rockwell Corp.* v. *N.L.R.B.*, 116 F. 2d 586 (2nd Cir. 1941), *Cert. den.*, 313 U.S. 594. (Appendix A, infra, p. 7a) (Brackets added).

REASON THE WRIT SHOULD BE GRANTED

1. The decision of the Court of Appeals goes far beyond the decided cases pertaining to the eligibility of former employees to vote in union representation elections. The Court below quoted from the landmark case of *Marlin-Rockwell Corp.* v. *NLRB*, *supra*:

> "A man who is laid off with reasonable expectation of being called back as soon as the employer's business picks up may well be concerned in the working conditions to which he will probably return and feel a lively interest in the selection of a collective bargaining representative. It is not unreasonable to include such a man in the voting unit." Id. at 588.

Your petitioner certainly recognizes this statement as a long accepted principle in determining the eligibility of voters. Its reasoning is sound. Likewise, the case of *NLRB* v. *Whiting*, *supra*, expresses the same principle, and these are the two cases cited by the Court below in rendering its judgment. Moreover, petitioner does not assert that the Jones Sausage case is limited to seasonal employment in its application. But none of these cases dealt with workmen drifting to many employers within an industry dependent upon specific contracts for specific dredging jobs. When the record shows that the challenged voters followed this pattern, and indeed, in some instances worked for other employers most of the time, then it is respectfully stated that the Court of Appeals has held that the challenged voters had a permanent reasonable expectation to be employed by all the employers in the industry for whom they worked sporadically. This is an anadomy and certainly goes far beyond the rationale of the "reasonable expectation for reemployment" doctrine quoted above from the Marlin-Rockwell case. In essence, the Court of Appeals has extended the law to permit the unionizing of an entire industry under the guise of reasonable expectation for reemployment at a reasonable time in the future. In doing so, it is respectfully submitted that the Court below committed error. Also, it is an important subject upon which this Court has not expressed itself.

2. The record in the Court below and before this Court is characterized by the subjective intent of the challenged voters rather than an objective approach to reasonable expectation for reemployment of former employees. The National Labor Relations Board overruled the challenges to voters in some instances and

sustained them in other instances, although the circumstances surrounding the eligibility of many of the former employees to vote were identical. Some of the challenged voters said they were available to work for Atkinson although they were regularly employed elsewhere. Petitioner urged the Court below not to adopt the standard, or lack of standard, that the desire or even the subjective intent of former employees creates a reasonably expectation for reemployment at a reasonable time in the future.

This would be tantamount to declaring that there is no objective standard whatever to the "reasonable expectation" test. The practical effect of such a holding should be evident. It is petitioner's position that this is precisely the ruling of the Board which was upheld by the Court of Appeals. The Court below does not comment upon this argument of petitioner. And yet there is no other explanation for the Board upholding the challenges of Bert Robertson, Graham Smith and Jerry Harrelson, whose last day of employment was April 29, and overruling the challenges of Hugh Brown, Willie Brown, Donnie Gillikin, Hampton Leonard, Eldred Robertson, S. D. Sellers and R. C. Dixon, whose employment also terminated on April 29, 1961. All of these men voted challenged ballots in the election and the record in the case shows the basic facts pertaining to Atkinson's employment of these men to be identical.

It is respectfully submitted that the record in this case shows that the employer does not know when, where, or if workers will be needed, and that the workers themselves recognize this fact. That is the nature of the business as shown by the record. The Board in its decision on the charge of an unfair labor practice may have necessarily reaffirmed its decision

in the representation case as stated by the Court of Appeals. However, petitioner's offer of proof relating to the representation case in the hearing on the unfair labor practice charge was denied (TR. Vol. 1, pp. 18, 132).

It is respectfully submitted that the Court below did not give the kind of scrutiny to the record before the National Labor Relations Board as required by this Court, and that the order of the Board does not rest upon adequate proof. *N.L.R.B. v. Universal Camera Corp.*, 340 U.S. 474 (1950).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for the Petitioner

April, 1964

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9090.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
ATKINSON DREDGING COMPANY, *Respondent*.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Argued November 7, 1963. Decided February 24, 1964.)

Before HAYNSWORTH and J. SPENCER BELL, Circuit Judges, and CRAVEN, District Judge.

Joseph C. Thackery, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Warren M. Davison, Attorney, National Labor Relations Board, on brief) for Petitioner, and George H. Revercomb and Hugh S. Meredith (Vandeventer, Black, Meredith and Martin on brief) for Respondent.

J. SPENCER BELL, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order that Respondent, Atkinson Dredg-

ing Company, collectively bargain with the International Union of Operating Engineers, Local Union 25, Marine Division AFL-CIO [hereinafter the Union], as the certified representative of Respondent's employees.[1] Respondent's admitted refusal to bargain is based on its contention that the Board improperly certified the Union after erroneously permitting ineligible former employees to vote in the representation election of May 4, 1961.

Respondent, a Florida corporation with its principal place of business at Great Bridge, Virginia, is engaged in marine construction and land reclamation between the eastern shore of Virginia and Key West, Florida. Respondent operates intermittently three dredges (the *Enterprise*, the *Northwood*, and the *Hampton Roads*), and hires workmen to operate these dredges, with the exact number employed dependent upon the available work. Upon application of the Union and after a representation hearing, the Board directed an election to be held on May 4, 1961, among all employees of Respondent engaged in dredging operations employed during the payroll period ending April 1, 1961.

At the election a total of thirty-five employees presented themselves to vote, including twenty-two employees whose names were not on Respondent's eligibility list. In accordance with Board policy, the ballots cast by these twenty-two men were challenged by the Board agent. Of the unchallenged ballots, five were for the Union and eight

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[1] The Board's order was based on a finding that Respondent had violated §§ 8(a)(1) and (5), 29 U.S.C. 158(a)(1) and (5); § 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title;

. . . .

(5) To refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title.

against. Since the challenged ballots were sufficient in number to affect the results of the election, the Regional Director conducted an investigation and directed that a hearing on the challenged ballots be held on September 19 and 26. Respondent was present and participated in the hearing. On October 27, the hearing officer issued his Report on Challenges, recommending that eight challenges be sustained and that fourteen be overruled and the ballots counted. Respondent filed exceptions to the recommendation that ten challenges be overruled, but made no exceptions to the remaining four. In a Supplemental Decision and Direction issued on April 11, 1962, the Board upheld the hearing officer's recommendation that fourteen of the challenged ballots be counted, but reversed the hearing officer's recommendation that the challenge to the ballot of one Floyd Hewit be sustained. Thus, fifteen additional ballots were added to those already counted, resulting in a union victory of fifteen to thirteen.

Respondent's consistent position has been that ten ballots were cast by former employees who had been severed from the Company payroll without "reasonable expectation of employment within a reasonable time in the future." *Whiting Corp.* v. *NLRB*, 200 F.2d 43, 45 (7 Cir. 1952). Respondent argues that the dredging business is subject to fluctuations and that no new dredging contracts may be obtained for an indefinite future period. It also argues that the Company more often than not hires local personnel at the sites of the dredging jobs obtained and that consequently there is no substantial continuity among its employees. On these grounds, Respondent reasons that the certification of the Union was improper (based as it was on ballots cast by permanently laid off employees) and, therefore, Respondent cannot be charged with a refusal to bargain. *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 154 (1941); *American Federation of Labor* v. *NLRB*, 308 U.S. 401 (1940).

Upon a review of the whole record we find that the Board's determination to the contrary is supported by substantial evidence. In the Board's decision and order of April 15, 1963, in the complaint case, the prior certification was considered and reaffirmed. Thus in ruling that Respondent had committed an unfair labor practice the Board necessarily found that no ineligible former employees had voted in the representation election of May 4, 1961. In this we concur. Since Respondent only contests the counting of ten of the fourteen challenged ballots, we must assume that the remaining four were properly counted. Of the contested ten, Respondent takes exception to one on the ground that the employee casting the ballot had been injured in February and was not working on either the eligibility date, April 1, or the date of the election, May 4; to two others on the ground that they were employed neither on the eligibility date nor on the date of the election; and to seven others on the ground that while employed on the eligibility date, they were laid off prior to the election date without a reasonable expectation of recall.

WALTON GILLIKIN

The record reveals that Walton Gillikin was working for Respondent on the *Hampton Roads* dredge in February, 1961. On February 11, he injured his finger and went to a doctor for treatment by the Captain of the *Hampton Roads*. Walton Gillikin stayed at home approximately a month, allowing his finger to heal, and then twice sent word back to the Captain—once by a fellow employee and once by the Captain's brother—that he was ready to return to work. Walton Gillikin was not recalled by Respondent, and accepted employment with a plumbing company sometime after the eligibility date of April 1, but prior to the election date of May 4. This job lasted approximately six or eight weeks and he then accepted other employment.

The informal practice utilized by Respondent's laid off employees of sending word back by fellow employees when they are ready to return to work is a procedure recognized and accepted by both employees and responsible company officials. Walton Gillikin, therefore was justified in making known in this fashion his ability and desire to return to work. Although the record is silent as to whether the messages were actually received by the *Hampton Roads* Captain, we think that the important point is that Gillikin attempted to make known his availability for work. Testimony of the Company vice-president is to the effect that an injured employee is still considered an employee if he expresses a desire to return to work after recovery from his injury. Therefore, the Board properly considered Walton Gillikin to be on tempoary sick leave and entitled to vote in the election.

BERKLEY GILLIKIN and LEON T. ROSE

Berkley Gillikin was first employed by Respondent on the dredge *Hampton Roads* in August of 1955. During the next five years he was employed principally by Respondent, although subject to the usual pattern of layoff and recall. He was most recently employed on the *Hampton Roads* on April 11, 1961, and worked until May 1, 1961, when he was laid off with Vice-President Todd's promise that he would be recalled "after the election." Shortly after May 1, the *Hampton Roads* began a new dredging job, but Berkley Gillikin was not recalled and accepted a permanent job with Construction Aggregates on May 5, 1961, the day following the election.

Leon T. Rose was first employed by Respondent in the early part of 1960 on the dredge *Hampton Roads* and thereafter experienced several layoffs and recalls. Rose was laid off in February of 1961, but was recalled on April 15 and then laid off again on May 1. Thus, like Berkley Gillikin, Rose was employed by Respondent neither on the eligi-

bility date, April 1, nor on the date of the election, May 4. On May 1, however, he was told by Dewey Merrill, Company Superintendent, that the laid off *Hampton Roads* employees would be called back after the election and to leave word as to how he could be contacted. Rose was not recalled and was employed by another firm two days after the election.

HUGH BROWN, WHITE B. BROWN, DONNIE GILLIKIN, HAMPTON LEONARD, ELDRED ROBINSON, R. D. SELLERS and C. R. DIXON, JR.

These seven men, with varying records of previous employment with Respondent, were all discharged by Respondent upon completion of the dredging project at Wilmington, North Carolina, by the dredge *Enterprise* on April 29, 1961. Each of these men was employed on the eligibility date of April 1, but was not employed on the day of the election, May 4. At the time of the April 29 layoff, however, the crew was told by Assistant Superintendent Masich or by Captain Norman Gillikin, either that the job was completed and that they would be laid off and called back when work was available, or when other dredges had work, or be transferred to the dredge *Hampton Roads*. The eligibility list prepared by Respondent for the election on May 4, however, excluded sixteen of the *Enterprise* crew members describing them as "employees who worked during the payroll period ending April 1, 1961, whose employment has terminated: Job completed."

In view of the above mentioned assurances by responsible company officials to Berkley Gillikin and Leon T. Rose and to the seven former crew members of the *Enterprise* we find support for the Board's determination that these nine men were temporarily laid off and at the date of the election held a reasonable expectation of reemployment within a reasonable time in the future. Questions of eligibility frequently arise where the nature of the enterprise

produces intermittent employment. In such enterprises, potential employees not working at the time of a representation election are often given the right to vote. The reason for this practice is clear. As stated by Judge Swan in *Marlin-Rockwell Corp.* v. *NLRB*, 116 F.2d 586, 588 (2 Cir. 1941):

> "A man who is laid off with reasonable expectation of being called back as soon as the employer's business picks up may well be concerned in the working conditions to which he will probably return and feel a lively interest in the selection of a collective bargaining representative. It is not unreasonable to include such a man in the voting unit."

The Fourth Circuit has upheld Board decisions which permitted unemployed seasonal employees to vote where they "had at time of the election a reasonable expectation of reemployment within a reasonable time in the future." *NLRB* v. *Jesse Jones Sausage Co.*, 309 F.2d 664, 665 (4 Cir. 1962). Respondent would have us give too narrow an interpretation to the *Jesse Jones Sausage* case and limit its application to seasonal industries where employees have a reasonable expectation of reemployment at a specific time in the future. There is nothing in the language or logic of the case to so restrict its application. Other Circuits have extended its rationale to sporadic as well as seasonal employment. See, e.g., *Whiting Corp.* v. *NLRB*, *supra*; *Marlin-Rockwell Corp.* v. *NLRB*, *supra*. The Board also recognizes that sporadic as well as seasonal employees should be permitted to vote in representation elections. See, e.g.: *Sears, Inc.*, 52 LRRM 1244 (1963) (on call floaters of retail department store); *Independent Motion Picture Producers Assn.*, 44 LRRM 1265 (1959) (musicians); *Sacramento de Marsea*, 31 LRRM 1096 (1952) (shipboard employees performing services as mechanics, welders, and laborers); *L. Antonsanti, Inc.*, 30 LRRM 1468 (1952) (construction and maintenance employees).

Respondent's hiring history indicates that it usually recalls workers with previous experience as dredging contracts are obtained. The dredging business is subject to fluctuation; yet Respondent continues operations and has not seen fit to liquidate. Thus, the number of workmen to be required at a given future date is uncertain, but the probabilities are that some unknown number will be employed. In this situation, Respondent's employees have made the necessary adjustments. When laid off by Respondent they seek employment with other dredging companies, turn temporarily to employment in other fields, or go on relief.

Respondent's employees are largely drawn from tidewater Virginia and North Carolina, and consider dredging their primary occupation. Although there is no seniority system with regard to layoffs and recalls, Respondent and its employees apparently have evolved an unofficial understanding that men with previous experience who live in the area will be recalled as jobs become available. This tacit understanding was made explicit in the present case by Respondent's officials indicating to nine discharged employees that their layoff was temporary and that they would be rehired. Although no such indication was made to Walton Gillikin, we think that he remained in an employee status while allowing an injury received on the job to heal. Walton Gillikin was sent to a doctor by his Captain and was told to stay home until the broken finger mended. His informal, but customary, message sent to Respondent's officials attempting to inform them of his readiness to return to work served to reaffirm the continuing employee-employer relationship.

Respondent advances another argument in its attempt to invalidate the election. Citing the *Merlin-Rockwell* case, *supra*, Respondent suggests that because Berkley Gillikin and R. D. Sellers were employed by other concerns on the day of the election their votes should not have been

counted. While it is true that an employee who has accepted *permanent* employment elsewhere on the day of an election may not vote, *Morenci Corp.*, 30 LRRM 1403 (1952), no such situation existed here as regards these two men.

Berkley Gillikin, contrary to Respondent's contention that he was a regular, full time employee of Construction Aggregates as of May 4, 1961, was not employed by that concern until May 5.[2] The record is less clear as to the employment status of R. D. Sellers. From the record we are unable to say whether he was employed elsewhere as of May 4, 1961, or later, and to determine whether such

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[2] Although the following testimony indicates that Berkley Gillikin was uncertain as to the *date* of the month that he started working for Construction Aggregates, it is apparent that he was certain as to the *day*, i.e., a Friday. The fifth of May in 1961 fell on Friday.

"Q. After that job (on the *Hampton Roads*) was completed, you came with the dredge back to Norfolk? A. (Berkley Gillikin) Yes, sir.

"Q. And then you were laid off, is that correct? A. I was laid off with the understanding that we would be notified Thursday or Friday whether we would be called back to work, or what to do.

"Q. And before that Thursday or Friday, you went to work for Construction Aggregates, is that correct? A. No, sir.

"Q. You went to work for Construction Aggregates May 4th? A. That was on Friday, wasn't it?

"Q. Was that on Friday? A. Yes, sir.

"Q. So on the Thursday or Friday following the Saturday in which you last worked, is that correct, Saturday is the last day you worked? A. Saturday was the last day I worked for Atkinson Dredging Company.

"Q. Yes. (69) A. That was the last day I worked for Atkinson.

"Q. *And the following Friday you went to work for Construction Aggregates, is that correct?* A. *Yes, sir.*" (Emphasis added.)

other employment was temporary or permanent.[3] Lacking a more definite record, we are unable to say that the Board incorrectly determined this man to be temporarily laid off and without permanent employment elsewhere at the time of the election. In this instance, the burden is on Respondent to show that the Board determination of eligibility was erroneous, not on the Board to prove it correct. *Cf. NLRB* v. *Huntsville Mfg. Co.*, 203 F.2d 430 (5 Cir. 1953).

Respondent introduced evidence that several other employees who were permitted to vote were employed elsewhere subsequent to the election, but as we stated in the *Jesse Jones Sausage* case: "developments after the election 'cannot color the picture as it stood on the critical date'." Thus, even if these other employees obtained permanent jobs with companies other than Respondent subsequent to the date of the election, this fact would be irrelevant in determining the outlook for future employment with Respondent as it existed on May 4, 1961.

Respondent raises a final point. Officials of Respondent allegedly overheard Walton Gillikin, at the close of the hearing on challenges on September 28, 1961, ask Peter

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[3] "Q. Are you working at the present time? A. (R. D. Sellers) Yes, sir, I am, with the Norfolk Dredging Company now.

"Q. When were you first employed with the Norfolk Dredging Company? A. Well, I don't recall exactly. It was a month and a half to two months later.

"Q. A month and a half to two months after your lay-off on April 29, 1961? A. Yes, about then.

* * * *

"(Hearing Officer) Were you working anywhere else during that two months' period?

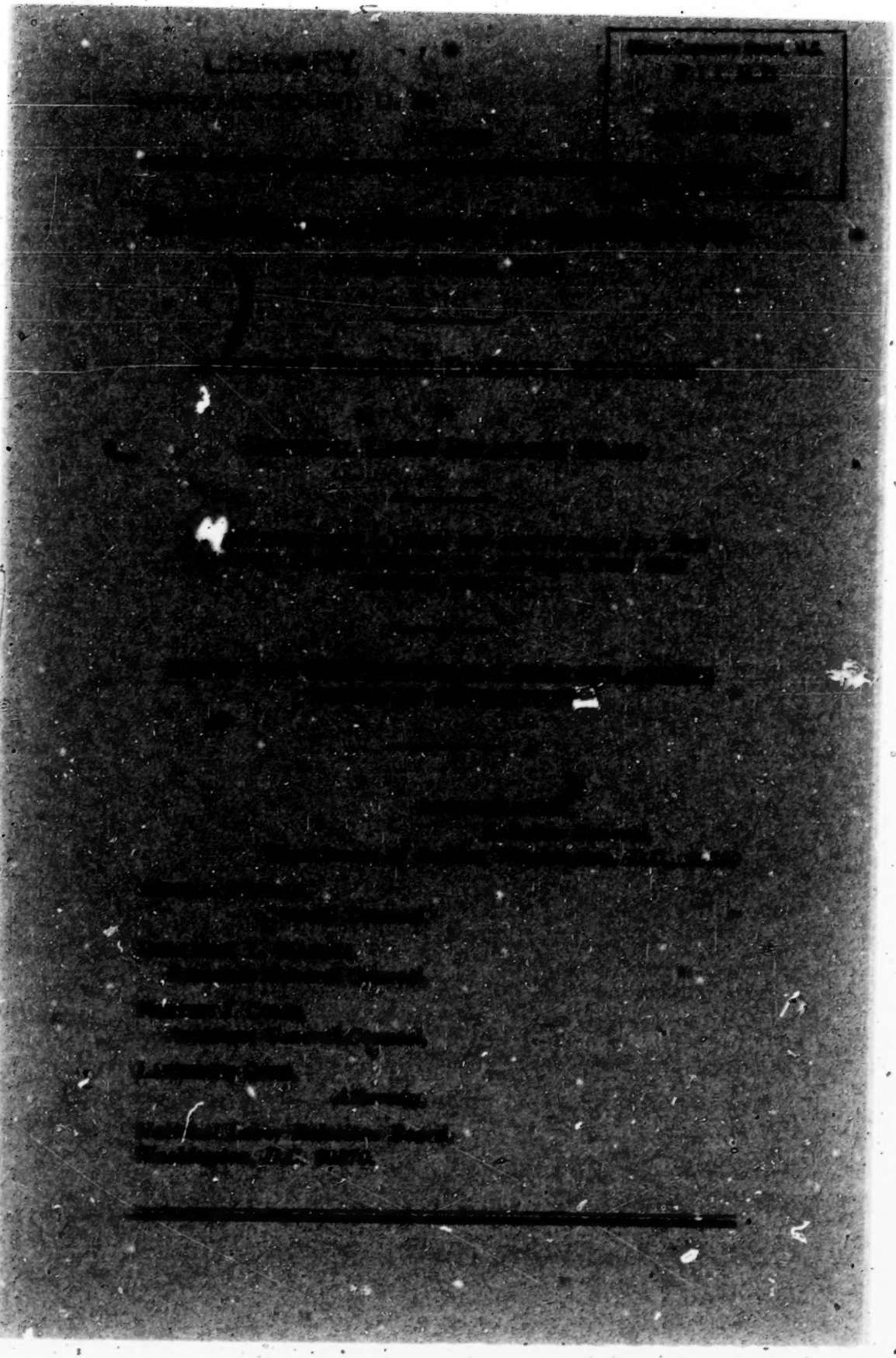
"(The Witness) *I worked with Construction Aggregates a couple of weeks, just before—it was after the lay-off.*

"Q. That would be in June, some time in June, 1961? A. *I can't recall exactly when it was, it was about a month after I got laid off.*" (Emphasis added.)

Buono, Business Representative of the Union, "Where is my money?" Although the Board's rules and regulations provide that objections to a representation election must be filed within a five day time limit prescribed by Sec. 102.69(a), 29 CFR 102.69(a), Respondent contends that since this statement was made some four months after the election, it could not have presented objections within the prescribed time limit. Respondent therefore earnestly contends that this court should remand this case and order the Board to give Respondent an opportunity to present further evidence on the validity of the election in accordance with the procedure established in *NLRB v. Lord Baltimore Press, Inc.*, 300 F.2d 671 (4 Cir. 1962) and *NLRB v. Poinsett Lumber & Mfg. Co.*, 221 F.2d 121 (4 Cir. 1955).

Respondent's position is that this remark warrants an inference that Walton Gillikin had been paid to vote for the union four months earlier. We think the Board committed no error in refusing to convene a hearing at Respondent's urgings. Unlike the employer in *NLRB v. Lord Baltimore Press, Inc., supra*, Respondent here did not demonstrate by its offer of proof before the Board that its evidence, if presented, would strongly tend to show that a bribe had been made to influence the outcome of the election. Respondent was not prepared to offer Walton Gillikin as a witness to substantiate its charges of misconduct and indeed, offered nothing in addition to the single remark, "Where's my money." We are not prepared to say that this remark, without more, raised "substantial and material factual issues" under Rules and Regulations Sec. 102.69(d) which would have required an investigation by the Board into the conduct of the election.

Enforcement Ordered.



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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1036

ATKINSON DREDGING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-11a) is not yet reported. The Board's decision and order (J.A. 1-17)[1] are reported at 141 NLRB 1316. The Board's decision in the underlying representation proceeding (J.A. 91-94, 114-116) is unreported.

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[1] "J.A." refers to the Joint Appendix in the court below, which was filed with the petition.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1964 (Pet. 1a, 11a). The petition for a writ of certiorari was filed on April 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that certain of the Company's employees, who were on temporary layoff or sick leave at the time of an election conducted by the Board, had a reasonable expectation of reemployment and thus were eligible to vote in that election.

STATUTE INVOLVED

The relevant sections of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), provide as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * *
>
> Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining

by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

STATEMENT

A. THE BOARD PROCEEDINGS

1. SUMMARY OF THE REPRESENTATION AND UNFAIR LABOR PRACTICE CASES

The Company is engaged in marine construction and land reclamation along the eastern shore between Virginia and Key West, Florida. It operates three dredges, the *Enterprise*, the *Northwood*, and the *Hampton Roads* (J.A. 3, 33). On April 6, 1961, the Board, upon a petition filed by International Union of Operating Engineers, Local Union 25, Marine Division, AFL-CIO, directed a representation election among the Company's employees employed during the payroll period ending April 1, 1961 (J.A. 4, 13-14, 22, 25).

At the election, conducted on May 4, 1961, thirty-five men sought to vote, including twenty-two whose names were not on the Company's eligibility list. In accordance with Board policy, the ballots cast by these twenty-two were challenged by the Board agent. Of the unchallenged ballots, five were for the Union and eight against (J.A. 4, 21, 31-32). Since there were sufficient challenged ballots to affect the election results and the challenges presented substantial issues

of fact, the Board ordered a hearing on the challenges. The hearing officer recommended that eight of the challenges be sustained and that fourteen be overruled (J.A. 31-77).

The Company filed exceptions to the rulings on ten of the fourteen challenges which the examiner rejected. It asserted that one of the ten men had been injured and had not returned to work; that two others were employed neither on April 1, the eligibility date, nor on May 4, the election date; and that the other seven were laid off prior to the election with no reasonable expectation of recall (J.A. 5, 78-85). The Board upheld the hearing officer's recommendation that fourteen of the challenged ballots be counted, but reversed one of the challenges which he had sustained (J.A. 5, 91-94). The result of including these fifteen additional ballots was that the Union won the election, fifteen to thirteen (J.A. 95). The Board certified the Union as the representative of the Company's employees (J.A. 114-116).

The Company refused to bargain with the Union, asserting that the certification was invalid because nine of the challenges were erroneously overruled (J.A. 7, 18-20).[2] A complaint was issued charging that the Company violated Section 8(a)(5) and (1) of the Act, and, after hearing, the Board so found (J.A. 1, 2-15). The Board ordered the Company to cease and desist from the unfair labor practice found

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[2] The Company did not renew its objection regarding one of the ten employees (Rose, see n. 3, p. 6, *infra*) whose ballot it challenged at the representation election.

and to bargain, upon request, with the Union (J.A. 14-15).

2. THE EVIDENCE RESPECTING THE NINE CHALLENGED EMPLOYEES AND THE BOARD'S CONCLUSIONS

The facts found by the Board, and its conclusions, respecting the nine employees as to whom the Company's challenges were overruled, are as follows:

Walton Gillikin.—Walton Gillikin worked for the Company on the dredge *Hampton Roads* in February 1961. On February 11, he injured his finger and, after receiving treatment from a doctor, was sent home by the Captain of the *Hampton Roads*. Walton Gillikin stayed at home for about a month, allowing his finger to heal, and then twice sent word back—once by a fellow employee and once by the Captain's brother—that he was ready to return to work. He was not recalled by the Company, and accepted employment with a plumbing company sometime after the eligibility date of April 1, but prior to the election date of May 4. This job lasted about six or eight weeks and he then accepted other employment (J.A. 70-71, 351-353). The informal procedure he followed in indicating his readiness to return to work was in accord with Company practice (J.A. 69, 71). Moreover, Company Vice-president Todd testified that an injured employee is still considered an employee if he expresses a desire to return to work after recovery (J.A. 70, 317). On these facts, the Board concluded that Walton Gillikin was an employee of the Company on temporary sick leave on April 1; that he had

thereafter manifested a readiness to return to work; that the other employment he obtained was only temporary; and that he was thus eligible to vote in the election (J.A. 70-71, 92-93).

Berkley Gillikin.—Berkley Gillikin was first employed by the Company on the dredge *Hampton Roads* in August 1955. During the next five years he was employed principally by the Company, pursuant to a pattern of layoff and recall. He was laid off in February 1961, when he was told that he would be recalled, and he was in fact recalled about April 15, 1961. He worked for the Company until May 1, 1961, when he was laid off with Vice-President Todd's promise that he would be recalled "after the election." Shortly after May 1, the *Hampton Roads* began a new dredging job but Berkley Gillikin was not recalled and he accepted a job with Construction Aggregates on May 5, 1961, the day following the election (J.A. 73-74, 184-189, 192-193). On these facts, the Board concluded that, in view of Berkley Gillikin's past history of layoff and recall, his recall on April 15 pursuant to a prior assurance, and the assurance, at the time of his May 1 layoff, that he would again be recalled, his layoff status on the April 1 eligibility date was temporary and did not disqualify him for voting in the election (J.A. 74).[1]

[1] The Board reached the same conclusion with respect to Leon F. Rose, whose situation was similar to that of Berkley Gillikin (J.A. 72-73). As noted (n. 2, p. 4, *supra*), the Company abandoned its challenge to Rose's vote.

The seven employees employed on the Enterprise.—Seven employees,[4] with varying records of previous employment with the Company, were all terminated on April 29, 1961, when the dredge *Enterprise* completed a project at Wilmington, North Carolina. They were told by Assistant Superintendent Masick or by the Captain either that the job was completed and that they would be laid off and called back when work was available or when other dredges had work, or that they would be transferred to the dredge *Hampton Roads*. However, the seven men were not recalled by the day of the election, May 4. (J.A. 33-39, 41-43, 64-65, 153, 159-160, 167, 174, 180, 198-199, 213.). The Board concluded that they were eligible to vote on May 4, 1961, because their layoff on April 29 was not in fact permanent, the men being assured of reemployment in the near future (J.A. 69, 93).

B. THE COURT OF APPEALS' DECISION

The court of appeals sustained the Board's findings as supported by substantial evidence, and enforced its order in full (Pet. 1a-11a).

ARGUMENT

The Company acknowledges (Pet. 7-8) that the Board and the court of appeals applied the correct principle of law in deciding whether employees not working at the time of a Board election are eligible

[4] Hugh Brown, White B. Brown, Dannie Gilliken, Hampton Leonard, Eldrod Robinson, R.D. Sellers, and C.R. Dixon, Jr.

to vote in the election, *i.e.*, whether the employee has a reasonable expectation of being recalled to work. See *Marlin-Rockwell Corp.* v. *National Labor Relations Board*, 116 F. 2d 586, 588 (C.A. 2), certiorari denied, 313 U.S. 594. Thus the only question presented is whether substantial evidence supports the Board's application of the principle in this case. Such an evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the facts summarized in the Statement (pp. 5-7) furnish ample support for the Board's conclusion that the employees in question had a reasonable expectation of further employment with the Company and thus were eligible to vote. As the court below stated (Pet. 8a):

> Respondent's [the Company's] hiring history indicates that it usually recalls workers with previous experience as dredging contracts are obtained. The dredging business is subject to fluctuation; yet Respondent continues operations and has not seen fit to liquidate. Thus, the number of workmen to be required at a given future date is uncertain, but the probabilities are that some unknown number will be employed. In this situation, Respondent's employees have made the necessary adjustments. When laid off by Respondent they seek employment with other dredging companies, turn temporarily to employment in other fields, or go on relief.
>
> * * * Although there is no seniority system with regard to layoffs and recalls, Respondent

> and if employees apparently have evolved an unofficial understanding that men with previous experience who live in the area will be recalled as jobs become available. This tacit understanding was made explicit in the present case by Respondent's officials indicating to nine discharged employees that their layoff was temporary and that they would be rehired. * * *

There is no substance to the Company's contention (Pet. 8-9) that the Board and the court below misapplied the reasonable-expectation-of-reemployment test by basing their determination whether the employee had such expectation on his subjective views rather than on objective considerations. As shown above, the Board's conclusion rested largely on the objective facts concerning the Company's layoff and recall history and the assurances of future employment which Company officials gave to the employees. But the employee's future job intentions are not irrelevant. The reason that an employee with a reasonable expectation of reemployment is entitled to vote is that such an employee "may well be concerned in the working conditions to which he will probably return and feed a lively interest in the selection of a collective bargaining representative." *Marlin-Rockwell, supra*. If an employee has no intention of returning to work for a particular employer, however, the purpose of the rule is not served by permitting him to vote in an election involving that employer merely because other

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The Court added that, although no such indication was made to Walton Gillikin, "he remained in an employee status while allowing an injury received on the job to heal" (Pet. 8a).

factors indicate that the employee could have been re-employed (had he so desired).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LAURENCE GOLD,
Attorney,
National Labor Relations Board.

MAY 1964.

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[1] There were valid reasons why the challenges of Bert Robertson, Graham Smith and Jerry Harrelson were sustained and those of the other seven employees laid off on April 29, 1961, were not (see Pet. 9). Employees Bert Robertson and Graham Smith did not testify at the Board hearing, and the Board found there was no evidence in the record to show the circumstances under which they were laid off, whether they had any expectancy of recall, or whether they were available had they been recalled (J.A. 76). As to Harrelson, the Board found that, unlike the other seven employees, he was not personally told, at the time of layoff on April 29, that he would soon be recalled (J.A. 72).

U. S. GOVERNMENT PRINTING OFFICE: 1964